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In the Supreme Court of the United States

OCTOBER TERM, 1956

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

This appeal by a motor carrier and by an association of such carriers seeks review of the judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The United States is an appellee but it believes that the appeal presents an issue of importance under the Interstate Commerce Act and that probable jurisdiction should be noted. The facts which the Government believes to be pertinent are as follows:

Schaffer Transportation Company (Schaffer), which holds a certificate authorizing it to transport granite as a common carrier by motor from points in Grant

County, South Dakota, to 15 states primarily in the midwest, applied to the Commission for authority to transport granite as such a carrier from Grant County to points in 10 additional states, and from points in Vermont to destinations in 16 midwestern or southwestern states (J. S. 29). After a hearing, the Commission's examiner recommended granting the authority requested (J. S. 41). On exceptions to the examiner's recommended order, Division 5 of the Commission, with one Commissioner dissenting, approved grant of the requested authority, with one limitation the validity of which is not in issue in this proceeding (J. S. 47-48).[1]

Schaffer's application was supported by three shippers of granite, by an association having 67 granite manufacturer members, and by six dealers who receive granite shipments from manufacturers (J. S. 31, 39). Division 5 found that, with the exception of transportation from Grant County to destinations in four states, the shippers and receivers who appeared as witnesses "have no for-hire motor service available to them to and from the points covered by the instant application" (J. S. 46). It found that all of the supporting witnesses agreed that existing rail service is "entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint" (*ibid.*). It also found further that the affected shippers "are faced with the competitive disadvan-

[1] The Division, having found that there was a certificated motor carrier engaged in transporting granite from Grant County to four of the states included in Schaffer's application, denied it authority to transport between the points as to which there was other available motor service (J.S. 40-41, 45, 47).

tage of having to compete with producers of granite at other locations which have truck delivery available"; that the lack of truck service handicaps these shippers in increasing their sales and expanding their markets; and that the proposed truck service would enable the dealer witnesses to maintain lower inventories, receive shipments faster and more frequently, and reduce the amount of crating necessary (*ibid.*). The Division observed that grant of the application would cause some diversion of traffic from the railroads, but it stated that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers" (J. S. 46-47).

The full Commission, by a closely divided vote, reversed Division 5. After a review of the evidence, it stated that all of the supporting witnesses complain that "rail service is too slow". It said that less-than-carload rail service, which is seldom used because of its higher cost, is "fairly good" although "not as expeditious as" the proposed motor service. It stated that it was "forced to conclude that the service presently available is reasonably adequate", and that the shippers' and receivers' main objective is "to obtain [lower] rates rather than improved service." The Commission's ultimate finding was that it had not been established that present or future public convenience and necessity require the proposed motor service. (J. S. 64-65.)

The district court held that the foregoing ultimate finding was supported by substantial evidence, and that the Commission had not acted illegally or arbi-

trarily (J. S. 23). The court held that the Commission had properly determined the adequacy of existing service "without regard to whether the existing service is provided by the railroads or other motor carriers" (J. S. 22). The court, in rejecting the contention that the Commission's action was contrary to the mandates of the National Transportation Policy, said that the Commission, having weighed all salient factors, was not required to set forth its findings in the terms of the provisions of that policy (J. S. 23-24).

DISCUSSION

The Commission's order denying Schaffer's application precluded the furnishing of transportation by motor to shippers whose only available transportation service was by rail. Although on the Commission's own findings the proposed motor service was faster, more flexible, and cheaper than the existing rail service, the application was denied upon the ground that the rail service was "reasonably adequate".[2] Appellants contend, and we think correctly, that the Commission in so acting failed to give effect to the National Transportation Policy declared by Congress (49 U. S. C. notes preceding §§1, 301, 901), that there shall be "fair and impartial regulation" of all modes of transportation subject to the Act, and that its provisions be administered so as to "recognize and preserve the inherent advantages" of each mode of transportation.

Section 207(a) of the Act, 49 U. S. C. 307(a), directs the Commission to grant a certificate of operating authority if a proposed motor carrier service is required

[2] Division 5 had found, on the same evidence, that the rail service was "entirely inadequate" (*supra*, p. 2).

by public convenience and necessity. When, as here, railroads have a monopoly of certain transportation and the proposal is to provide significantly better transportation service by means of trucks, it would seem that the Congressional mandate is frustrated if "reasonable adequacy" of the existing rail service is made the criterion of public convenience and necessity. This shuts the door upon the advantages inherent in the proposed truck service, and it maintains the *dis*-advantages, not the advantages, inhering in the mode of transportation first in the field.

This Court has not hesitated to strike down orders of the Interstate Commerce Commission involving applications of the Act not consistent with preserving the advantages possessed by one mode of transportation compared with some other mode. In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Court invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived at Chicago by barge rather than by rail, and held that the National Transportation Policy, as well as other provisions of the Act, forbade this discrimination. The Court said that Congress "left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part." 330 U. S. 579.

Dixie Carriers, Inc. v. *United States*, 351 U. S. 56, held that when the railroads had established and were maintaining a through route and joint rate for all-rail traffic between certain points, the Commission erred in refusing to establish a through route and a joint rate for rail-barge traffic between the same points, because shippers were thereby denied the "inherent ad-

(R. 22–23). The Division based its conclusion on the following findings:

Aside from the service as to which operating authority was denied, shippers and receivers "have no for-hire motor service available to them to and from the points covered by" Schaffer's application. All the supporting witnesses agreed that rail service was entirely satisfactory for carload shipments "but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint", because of the delays and damage to merchandise experienced in these shipments. The monument manufacturers, asked by their customers to ship by truck, have been "faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available," and lack of truck service has handicapped them in increasing their sales and expanding their markets.[1] In addition, truck shipments require less crating, with resulting time and money savings. The

[1] There was testimony that Barre has a reputation for "finely carved and sculptured memorials", that it is noted for its very skilled craftsmen and artisans, and that it has long been known as "more or less the memorial art center" (R. 134). A Barre manufacturer with annual shipments of 1,600,000 pounds into the 16 involved western states testified that he understood that producing areas in Georgia and Minnesota had motor carrier service to the midwest area and that salesmen and an occasional dealer had told him that his company had lost business because of the lack of like service to this area (R. 230). Another manufacturer shipping annually 5,000,000 pounds into the 16 states expressed the firm conviction that institution of Schaffer's service would increase his business in these states (R. 255).

proposed motor service would likewise benefit monument dealers. They would "receive their freight faster and more frequently", would be able to maintain lower inventories, and would be aided in meeting deadlines fixed by their own customers. (R. 21–22.)

The Division recognized that grant of the application would unquestionably divert some traffic from the railroads (R. 22). Its position on this was that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers" (*ibid.*).

On petitions for reconsideration filed by the opposing railroads, the full Commission assumed jurisdiction of the proceeding (R. 25) and, by a six to four vote (R. 366),[5] found that Schaffer had failed to establish that public convenience and necessity require the proposed service. The grounds given for this finding were that the presently available rail service is "reasonably adequate"; that those who supported the application did so mainly in order to "obtain lower rates rather than improved service"; and that this is "not a proper basis" for grant of new operating authority. The Commission also stated that, although all supporting witnesses had found fault with the presently utilized rail service, they nevertheless are "reasonably satisfied" with this service except for the one universal complaint that "rail service is too slow", but that less-than-carload rail service, "while not as ex-

[5] See also appellant's brief, note 1a, page 3.

peditious as the proposed service, is fairly good" (R. 37).

The district court, in upholding the Commission's order, stated that it was "unable to say" that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously (R. 366). The court reached this conclusion after referring to the Commission's finding that existing rail service is "reasonably adequate", and after adopting the view that the Commission, in determining the need of shippers for a proposed new service, is entitled to weigh such need "against the capabilities and facilities of the existing carriers" without regard to whether this weighing involves only rail capabilities and facilities (*ibid.*).

In the district court, the United States supported the Commission's order. After the appeal was filed, the United States concluded, on further analysis of the facts and issues, that the Commission's order probably is erroneous, and it filed a memorandum opposing the Commission's motion to affirm. After further study of the case, the United States adheres to this conclusion, and this brief therefore supports the appellants.

SUMMARY OF ARGUMENT

The Commission found that the motor service for which Schaffer sought a grant of operating authority would be superior to the rail service which alone was available to the shippers whom he sought to serve. The Commission nevertheless found that the proposed service was not required by public convenience and

necessity. The grounds of this finding were that the existing rail service was reasonably adequate and that the shippers supporting Schaffer's application were more interested in obtaining lower rates than in obtaining improved service. We believe that, under the statute, neither of these grounds constitutes a valid basis for rejection of Schaffer's application.

The more expeditious service which he proposed was of material importance to the shippers concerned, and this improvement in service was an advantage inhering in service by motor as distinguished from service by rail. The National Transportation Policy declared by Congress requires that the Interstate Commerce Act be so administered as to recognize and preserve the "inherent advantages" of each of the modes of transportation subject to regulation, rail, motor, and water, and that all of the provisions of the Act be administered with the view to effectuating this policy. Where, as here, railroads have a monopoly of the transportation involved, the proper measure of whether a proposed motor service is required by public convenience and necessity is not the reasonable adequacy of the rail service, viewed from the standpoint of the economics and practicalities of railroad operations. The necessary test, which the Commission failed to apply, is whether the proposed motor service is superior to the existing rail service, in a respect inhering in the differing mode of transportation.

The fact that the shippers supporting Schaffer's application desired both better rates and improved service is likewise not a valid ground for rejecting the

application. The advantage of improved service is not nullified or rendered illegitimate by the shippers' expectation that it will also be a lower-cost service. Moreover, irrespective of whether service at lower rates is a matter of public convenience and necessity when a motor carrier seeks to enter a field already served by other motor carriers, proposed lower-cost motor service for those having only rail service represents, at least under the facts of this case, an advantage inhering in the different mode of transportation. We submit that the decisions of this Court holding that the Commission may not so administer the Act as to withold from water carriers or the public the advantages inhering in the low cost of water transportation are applicable and controlling here.

Our interpretation of the application of the National Transportation Policy to the facts of this case accords with both this Court's interpretation of the effect of this policy declaration and the interpretation which, as indicated by legislative history, was intended by Congress.

ARGUMENT

THE INTERSTATE COMMERCE COMMISSION'S REJECTION OF SCHAFFER'S APPLICATION FOR AUTHORITY TO PROVIDE A MOTOR SERVICE SUPERIOR TO THE RAIL SERVICE WHICH ALONE WAS AVAILABLE TO SHIPPERS MISINTERPRETED THE STATUTORY TEST OF "PUBLIC CONVENIENCE AND NECESSITY", IN THAT THE COMMISSION THEREBY DENIED TO THE PUBLIC "INHERENT ADVANTAGES" OF A DIFFERENT MODE OF TRANSPORTATION, CONTRARY TO THE MANDATES OF THE NATIONAL TRANSPORTATION POLICY DECLARED BY CONGRESS

The United States does not contend that the public convenience and necessity of a proposed motor service is established in and of itself by a showing that rail service is the sole available common carrier service. It does urge that, when railroads have such a monopoly, the Commission misinterprets the "public convenience and necessity" criterion if it bars from the field a motor carrier proposing to furnish significantly superior service. Such action by the Commission, in our view, contravenes the command of the National Transportation Policy: That the Commission shall administer all provisions of the Interstate Commerce Act to the end that the "inherent advantages" of each of the three modes of regulated transportation be recognized and preserved and that "adequate, economical, and efficient" transportation service be promoted.

The Commission's own findings establish that Schaffer proposed a superior service. It found that this service would be more expeditious than less-than-carload rail service (R. 37), and subsidiary findings establish how markedly superior his service would be in this respect. The Commission found that, on l. c. l. (less-than-carload) rail shipments from Vermont, the transit time to a St. Paul, Minn., dealer is 3½ to 6 weeks (R. 30); to a Rockford, Ill., dealer 3 to 5 weeks (R. 32); to an Aberdeen, S. D., dealer about 17 days (R. 31); and to the 16 western states generally, 2 weeks on the average (R. 34). It also found that Schaffer proposed to transport to points in these states in 5 to 8 days (R. 28).[6]

The fact, as found by Division 5, that, "in the main", rail carload service is "satisfactory" (R. 21) is immaterial. The public convenience and necessity of Schaffer's proposed motor service depends upon the advantages which it offers over the service with which it is competitive—less-than-carload rail service. As shown above, for those who ship in l. c. l. quantities, his service would cut transit time fifty percent or more.

The Commission did not find, nor does the evidence furnish any basis for a finding, that shippers are not materially concerned with the time required to transport from manufacturer to dealer. On the contrary, the Commission found that every shipper witness, whether manufacturer or dealer, complained that "rail service is too slow" (R. 37). The importance

[6] Schaffer testified that he expected to transport to the points in these states in 4 to 7 or 8 days (R. 68).

of this factor to shippers is further shown by the findings of Division 5 that more prompt and reliable delivery time would enable dealers to maintain smaller inventories and to meet the deadlines of their customers, and would enable manufacturers to compete more successfully with other monument manufacturers having truck service from manufacturer to dealer (R. 22).[7] A Vermont manufacturer who ships annually 1,600,000 pounds into the 16 western states covered by Schaffer's application testified, in answer to a question as to the advantage of speedy delivery to customers, that "our business is seasonal" and that certainly in the spring "every day counts from a dealer point of view" (R. 229).[8] The field representative of the association representing 67 Vermont manufacturers in traffic and shipping matters testified that "people seem to take a long time to buy them [monuments], and once they buy them, they want them in a hurry", and that speedy transportation is important because otherwise retail monument dealers will in many cases "switch their customers to other granites" (R. 133).

Not only are shippers concerned with obtaining the speedier transportation of less-than-carload shipments which Schaffer offered to provide, but shipment of granite monuments is principally in less-than-carload quantities. The South Dakota producer who supported the part of Schaffer's application relating to

[7] The full Commission, in its report, did not repudiate these findings or make inconsistent findings.

[8] The peak of the season is Memorial Day, and to a lesser extent Mother's Day and All Souls' Day (R. 78, 250).

transportation from Grant County shipped principally in less-than-carload quantities (R. 28). As to the supporting Vermont manufacturers, one had 213 dealer customers in the 16 western states involved, and 168 of these dealers, or nearly 80% of the total, bought in l. c. l. quantities (R. 253–254; App. Ex. 24, R. 332). Another shipped into these states 1,600,000 pounds annually, of which about 600,000 pounds went by l. c. l. rail, 600,000 pounds in rail "pool" cars (constituting aggregations of numerous l. c. l. shipments, R. 234), and only about 400,000 pounds, or 25%, in straight carloads (R. 241).

The Commission gave two grounds for denying Schaffer's application, (1) that l. c. l. rail service is "fairly good" and the existing rail service "reasonably adequate" and (2) that the "main purpose" of those who supported his application was to "obtain lower rates rather than improved service" (R. 37). We address ourselves to these grounds.

The Commission did not explicate what it meant by "fairly good" or "reasonably adequate", but it is unnecessary to inquire what standards were applied in making these characterizations. Under the statute, the requirements of public convenience and necessity are to be determined, not on the basis of the reasonable adequacy of the existing service, considered solely from the standpoint of the economies and practicalities of rail operations, but on the basis of whether the proposed new mode of transportation would provide superior service.

The slowness of l. c. l. rail service, as reflected in the findings and record, may well be a necessary inci-

dent to transportation, in carloads of mixed freight, to destinations requiring interchanges with other rail carriers. The relevant consideration is that the motor service which Schaffer proposed to inaugurate would be more adequate, economical, and efficient than rail less-than-carload service.[9] He would carry granite monuments exclusively, thus serving the needs of this trade, and would transport directly from manufacturer to customer.

We submit that the statutory requirements are correctly interpreted in the statement by Division 5 that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need", and that the public may not be deprived of a "new and improved service" merely because it diverts some traffic from the carriers currently providing service (R. 22).

Where, as here, railroads have a monopoly of certain transportation and the proposal is to provide significantly better transportation service by means of trucks, denial of the proposed service on the ground that the existing rail service is "reasonably adequate" conflicts with the direction to the Commission, embodied in the National Transportation Policy declared by Congress, that it administer the Act so as to recognize and preserve the "inherent advantages" of each

[9] His service, in addition to its greater speed, would require less crating, would eliminate the inconvenience and expense to the receiver incident to obtaining delivery when he is not located on a railroad siding or in a town with railroad service, and was expected to result in less damage to merchandise while in transit. See findings of Division 5 (R. 21-22), which the full Commission did not directly or indirectly reject.

mode of transportation, rail, motor, and water. Such action does not recognize and preserve the advantages inherent in the proposed truck service. Rather, it maintains the *dis*advantages, not the advantages, inhering in the mode of transportation first in the field.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Court invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived at Chicago by barge rather than by rail, and held that the National Transportation Policy, as well as other provisions of the Act, forbade this discrimination. The Court said that Congress "left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part." 330 U. S. at 579.

Dixie Carriers, Inc. v. *United States*, 351 U. S. 56, held that, when the railroads had established and were maintaining a through route and joint rate for all-rail traffic between certain points, the Commission erred in refusing to establish a through route and a joint rate for rail-barge traffic between the same points, because shippers were thereby denied the "inherent advantages" of water transportation. The Court pointed out that the statute required the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest", and it said that the guide to the Commission's action is the public interest "as defined in the Act." 351 U. S. at 60. The Court further held that the "public interest" as so defined includes administration

of the Act so as to preserve the "inherent advantages" of water transportation and the lower cost of this particular mode of transportation. 351 U. S. at 60–61.

The Commission's second ground for rejecting Schaffer's application was the equivocal finding that the evidence "indicates" that those supporting the application had as their main objective obtaining lower rates rather than improved service.[10] We believe this clearly to be an unsound ground of rejection. An improved service is scarcely less advantageous to the public because it additionally gives shippers the advantage of lower rates. The lower-rate advantage does not cancel out, or otherwise qualify, the improved-service advantage.

Aside from the foregoing, we submit that the Commission misinterpreted the statutory test when it ruled that the lower cost of Schaffer's proposed service "is not a proper basis for a grant of [operating] authority" (R. 37). Irrespective of whether the prospect of lower rates tends to show public convenience and necessity when a motor carrier seeks to enter a field already served by one or more motor carriers, a lower-cost motor service for shippers having solely rail service is a matter of "public convenience and necessity" as that phrase is "defined in the Act" by the directions and mandates of the National Transportation Policy. *Dixie Carriers* held that the lower cost of water transportation as compared with rail transpor-

[10] Division 5, on the same evidence, found that all the shippers and receivers who appeared as witnesses were agreed that the rail less-than-carload service was entirely inadequate "not only from the standpoint of cost, but also and primarily from a service standpoint" (R. 21).

tation is an inherent advantage of the former mode of transportation and, in view of the mandates of the National Transportation Policy, may not be denied to shippers where the statutory test to be applied is "necessary or desirable in the public interest." So here, motor transportation, if its cost be lower than transportation by rail, is an advantage inhering in the different mode of transportation, and this inherent advantage may not be denied to shippers under the statutory standard of "public convenience and necessity."

The motion to affirm which the Commission filed in this case stated (p. 4): "The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority since that is a matter for which other sections of the Interstate Commerce Act provide a remedy." But the remedy elsewhere provided in the Act, prescription of maximum reasonable rates, provides no effective remedy when the only available service is rail service. In that situation, the reasonableness of the rates charged by the presently operating carriers necessarily is measured exclusively by the operating conditions and economics of rail transportation. To the extent that these rates are above the rates which a motor carrier, conducting an altogether different type of operation, might reasonably charge, the public is denied the "economical" and "efficient" service to which it is entitled, and it is denied an advantage inhering in a different mode of transportation. Moreover, five of

the six rulings which the Commission cited as showing its consistent refusal to grant a motor carrier new operating authority on the basis of proposed lower rates are not in point since they involved applications to provide service which other motor carriers were already providing.[11] In the one exception, *Youngblood Extension of Operations—Canton, N. C.*, 8 M. C. C. 193, while the only existing service was rail (8 M. C. C. 195), other motor carriers opposed the application (8 M. C. C. 193–194).

The National Transportation Policy provides for administration of the Act to the end of developing and preserving a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." Accordingly, an application by a motor carrier for operating authority may properly be rejected if it appears that grant of the application would make such inroads on the traffic and revenue of the existing carriers that their ability to serve the needs of commerce, the postal service, and the national defense would be impaired. In the present case, however, not only was there no showing of the revenues received by the railroads from transportation of granite, but no estimate was made of the

[11] *Wellspeak. Common Carrier Application*, 1 M. C. C. 712, 714; *Johnson Common Carrier Application*, 18 M. C. C. 194, 195–196; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 347–348, 350; *Omaha & C. B. Ry. & Bridge Co. Common Carrier App.*, 52 M. C. C. 207, 235.

probable revenue loss should Schaffer's application be granted. In any event, it is plain that the revenue loss could not possibly have any appreciable adverse effect upon the railroads concerned. See Appellants' Brief, p. 20.

The emphasis which we have given to the National Transportation Policy not only accords with the interpretation placed on that policy by this Court (see *supra*, pp. 18-19), but also with the basic purpose of Congress as reflected in the legislative history. The last sentence of the declaration, "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy", was adopted through an amendment offered from the floor of the House. 84 Cong. Rec. 9861, 9866. In a detailed study of the policy declaration, it has been said that the intention of the proponents of this amendment was that "in any apparent conflict between the specific provisions of the Act and the declaration of general purposes in the National Transportation Policy, the latter should be the lodestar in seeking the meaning of the words of Congress." Oppenheim, *The National Transportation Policy and Inter-Carrier Competitive Rates* (1945), p. 13. For a summary of the relevant legislative materials, see *id*, chapter I; *Interstate Commerce Commission* v. *Mechling, supra*, 330 U. S. at 575–576; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 697–701 (dissenting opinion of Mr. Justice Black).

CONCLUSION

The judgment of the district court should be reversed, with directions to set aside the order of the Commission and to remand the case to it for further proceedings not inconsistent therewith.

Respectfully submitted.

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vantages" of water transportation. The Court, after pointing out that the statute required the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest", said: "The public interest, as defined in the Act, is the guide to the Commission's action". The "public interest" as so defined included administration of the Act so as to preserve the "inherent advantages" of each mode of transportation subject to regulation. 351 U. S. 60-61.

The Interstate Commerce Commission in its motion to affirm states (p. 3) that the Commission's determination was based upon "the adequacy of existing rail *and* motor carrier service". We doubt that this is a proper construction of the Commission's action. Aside from the operating authority denied by Division 5 and not in issue in this proceeding, nowhere in the Commission's report is there a finding of available motor service, and Division 5 categorically found to the contrary (J. S. 46). The fact (see Comm. Motion, p. 4) that several supporting witnesses had failed to investigate the availability of motor carrier service is, we believe, without significance. The four witnesses in question were dealers in the midwest receiving shipments from Vermont[3] and, as the Commission itself found, "consignees ordinarily leave the routing to the producers" (J. S. 52). The Commission's report discloses no such statement by those who testified on behalf of actual Vermont shippers, one of whom shipped annually 1,600,000 pounds (J. S. 59) and another over 5,000,000 pounds (J. S. 61), or on behalf of the trade association

[3] The combined annual receipts of the four dealers ranged from 115,00. to 140,000 pounds (J.S. 56-58).

which arranged pool car shipments for its many manufacturer members (J. S. 62).

The appeal, in our view, presents the question whether there has been an erroneous application of the statute which tends to thwart one of its basic purposes—that the public be given opportunity to choose between different media of transportation, at least to the extent that the services of any particular medium provide unique or special advantages. It appears that until recently the Commission itself had adhered to the principle that the existence of adequate rail service is insufficient ground for denying to a motor carrier authority to serve the same area, and that shippers are entitled to a choice between rail and motor carrier service. See J. S. 9-11; Hearings before the Select Committee on Small Business, United States Senate, 84th Cong., 1st sess., relating to ICC Administration of the Motor Carrier Act, pp. 139-140.

In the district court, the United States supported the Commission's order. On further analysis of the facts and issues, the Government has concluded that the order probably is erroneous and that summary affirmance is not warranted.

Respectfully submitted,

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NOVEMBER 1956.

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